

U.S. B 250B

# UNITED STATES BANKRUPTCY COURT

NORTHERN

DISTRICT OF

ILLINOIS

In re Cynthia A. Schmidt and Andrew Schmidt

Debtor

Bankruptcy Case No. 09-29918

Cynthia A. Schmidt and Andrew Schmidt

Plaintiff

Chapter 13

Albany Bank & Trust

Defendant

Adversary Proceeding No.

## SUMMONS IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to file a motion or answer to the complaint which is attached to this summons with the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall file a motion or answer to the complaint within 35 days.

Address of Clerk  
219 S. Dearborn  
Chicago, IL 60610

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Name and Address of Plaintiff's Attorney  
Robert J. Adams & Assoc.  
125 S. Clark, Suite 1810  
Chicago, IL 60603

If you make a motion, your time to answer is governed by Fed.R. Bankr.P. 7012.

YOU ARE NOTIFIED that a status hearing has been set at the following time and place.

Address  
219 S. Dearborn, Room 682  
Chicago, IL 60610

Room 682
Date and Time 10/26/2009 10:30 AM.

**IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.**

Kenneth S. Gardner

Clerk of the Bankruptcy Court

By:

Date

Deputy Clerk

I, Tiffany Chancellor, certify that I am, and at all times during the  
(name)

service of process was, not less than 18 years of age and not a party to the matter concerning which service of process was made. I further certify that the service of this summons and a copy of the complaint was delivered

09-09-09 by:  
(date)

☒ Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to:

☐ Personal Service: by leaving the process with defendant or with an officer or agent of defendant at:

☐ Residence Service: By leaving the process with the following adult at:

☐ Publication: The defendant was served as follows: [Describe briefly]

☐ State Law: The defendant was served pursuant to the laws of the State of \_\_\_\_\_,  
as follows: [Describe briefly] (name of state)

Under penalty of perjury, I declare that the foregoing is true and correct.

9-9-09 T Chancellor  
Date Signature

Print Name	<u>Tiffany Chancellor</u>		
Business Address	<u>Robert J. Adams &amp; Associates</u>		
City	State	Zip	
<u>Chicago</u>	<u>IL</u>	<u>60603</u>	

Cynthia A and Andrew W Schmidt

4741 N Oketo Ave

Hardwood Hghts, IL 60706

Albany Bank and Trust

3400 West Lawrence

Chicago, IL 60625

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION**

In re: Cynthia A. Schmidt and Andrew W. Schmidt	)	IN A CHAPTER 13 PROCEEDING
	)	
Debtor(s)	)	
Cynthia A. Schmidt and Andrew W. Schmidt	)	Case No. 09-29918
Plaintiff(s)	)	
	)	
vs.	)	Adversary No.
Albany Bank and Trust	)	
Defendant	)	Judge Jack B. Schmetterer
	)	

**COMPLAINT TO AVOID JUNIOR MORTGAGE LIEN**

NOW COMES Cynthia A. Schmidt and Andrew W. Schmidt, the Debtor(s) and Plaintiff(s) herein and hereinafter referred to as "Plaintiff(s)", by and through the Law Offices of Robert J. Adams & Associates, and complains of the Defendant, Albany Bank and Trust, and states as follows:

**PARTIES**

1. The Plaintiff(s), Cynthia A. Schmidt and Andrew W. Schmidt, an individual who reside(s) in the State of Illinois.
2. The Defendant, Albany Bank and Trust, a company that regularly does business in the State of Illinois, particularly in the business of mortgage lending and services.

**JURISDICTION**

3. On 8/14/2009, Plaintiff(s) filed a voluntary petition for relief under 11 U.S.C. Chapter 13.
4. This adversary proceeding arises under Sections 502 and 506 of the United States Bankruptcy Code and is a core proceeding under 28 U.S.C. §157(b)(2)(K).
5. This Honorable Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 in that this action relates to Bankruptcy Case Number 09-29918, *In re Cynthia A. Schmidt and Andrew W. Schmidt*, which is presently pending before this Honorable Court.

**STATEMENT OF FACTS**

6. Plaintiff is the owner of real estate, hereinafter referred to as "The Schmidt Property," with the following legal description:

LOT 11 (EXCEPT THE SOUTH 7.74 FEET THEREOF) IN BLOCK 4 IN OLIVER SALINGER AND COMPANY'S SECOND LAWRENCE AVENUE MANOR, BEING A SUBDIVISION OF LOT 7 IN C. R. BALL'S SUBDIVISION OF THE NORTH HALF OF THE NORTHERN WEST QUARTER OF SECOND 18, TOWNSHIP 40 NORTH, RANGE 13, EAST OF THE THIRD PRINCIPAL MERIDIAN, AND THE NORTH 25.4 ACRES OF THE NORTH EAST QUARTER OF SECTION 13, TOWNSHIP 40 NORTH, RANGE 12, EAST OF THE THIRD MERIDIAN, IN COOK COUNTY ILLINOIS, WITH Permanent Index No.12-13-204-041-0000: , and commonly known as 4741 N. Oketo Ave., Hardwood Hgts, IL 60706, .

7. The Schmidt Property has a value of \$242,000. (Attached as Exhibit A is an appraisal dated .)
8. A first mortgage lien on The Schmidt Property is held by WELLS FARGO. The unpaid principal balance as of the date of the filing of the petition is \$250,866.51. The amount of prepetition arrears is \$40,994.15 (Attached as Exhibit B is the proof of claim filed by the first mortgage holder.)
9. Defendant holds a junior mortgage originally granted in the amount of \$24,611.24 dated October 12, 2006 and recorded as document number 0629006091. (Attached as Exhibit C is evidence of the lien.).
10. That the defendant filed a proof of claim with a current balance of \$14,039.81 and \$1,937.07 in pre-petition arrears. (Attached as Exhibit D is evidence of the proof of claim).
10. Plaintiff now seeks to avoid the junior mortgage lien of Defendant.

### **CAUSE OF ACTION**

12. Under §§ 506(a) and 506(d), Defendant's junior mortgage would be an allowed secured claim only to the extent of the value of the estate's interest in the property securing the claim, and Defendant's lien is void to the extent it is not an allowed secured claim.
13. The claim of the first mortgage holder exceeds the value of The Schmidt Property.
14. Because Defendant's junior mortgage lien is wholly unsecured, it should not be allowed a secured claim and the junior mortgage lien may be stripped off. In re: Mann, 249 B.R. 831, 840 (1st Robert Adams & Associates, 125 S. Clark, Suite 1810, Chicago, IL 60603 (312) 346-0100 P.2

Cir. BAP 2000); In re: Pond, 2002 U.S.App. Lexis 11287 (2nd Cir. 2001); In re: McDonald, 205 F.3d 606 (3d Cir. 2000); Bartee v. Tara Colony Homeowners Assoc. (In re: Bartee), 212 F.3d 277 (5th Cir. 2000); In re: Lam, 211 B.R. 36 (9th Cir. BAP 1997) appeal dismissed on other grounds 192 F.3d 1309; In re: Tanner, 217 F.3d 1357 (11th Cir.).

WHEREFORE Cynthia A. Schmidt and Andrew W. Schmidt, the Plaintiff herein, prays that this Honorable Court enter a Judgment against Defendant, Albany Bank and Trust , avoiding the junior mortgage lien against The Schmidt Property.

Respectfully submitted,

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Cynthia A. and Andrew W. Schmidt  
Robert J. Adams & Associates